UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PURPLE COMMUNICATIONS, INC. and Its Successor and Joint Employer CSDVRS, LLC d/b/a ZVRS,		
Employers,	Case Nos.	21-CA-149635
		28-CA-179794
and		21-CA-182016
		32-CA-185337
PACIFIC MEDIA WORKERS GUILD, LOCAL 39521, THE NEWSPAPER GUILD, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,		21-CA-185343
		27-CA-185377
		27-CA-186448
		28-CA-186509
		21-CA-187642
Charging Party.		28-CA-192041
		27-CA-192084
		28-CA-197009
		28-CA-197062

REPLY BRIEF TO THE COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENTS' EXCEPTIONS

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GLOSSARY OF ABBREVIATIONS

ALJ	Administrative Law Judge
Board	National Labor Relations Board
CBA	Collective Bargaining Agreement between Purple Communications, Inc. and the Pacific Media Workers Guild, Local 39521, The Newspaper Guild, Communications Workers of America, AFL-CIO
CGC	Counsel for the General Counsel
Charging Party or union	Pacific Media Workers Guild, Local 39521, The Newspaper Guild, Communications Workers of America, AFL-CIO
CSDVRS	CSDVRS, LLC d/b/a ZVRS
GC	General Counsel's Exhibit
JT	Joint Exhibit
NLRA or Act	National Labor Relations Act
Purple or company	Purple Communications, Inc.
R	Respondent's Exhibit
Tr.	Transcript

INTRODUCTION

The CGC spends much of its brief attempting to tar Purple as a bad actor, accusing Purple of being a "recidivist employer" for relying on the Board's then-established law regarding email use, and emphasizing *Purple Communications, Inc.*, 361 N.L.R.B. 1050 (2014). The Board is currently deciding whether to overrule that decision, the only time that Purple was previously found to have violated the Act. But Respondents' opening brief detailed a series of rulings that effectively gerrymandered the meaning of a collective bargaining agreement and rewrote a half-century of Board and court precedent interpreting the Act. The CGC's effort to shift attention to unrelated allegations and a legal standard currently under review hardly excuses the string of erroneous and one-sided rulings in this case. Nor does it justify the punitive remedial order that was anything but remedial.

Seeking to evade review on the merits, the CGC repeatedly asserts that Purple somehow made a "conscious choice" to abandon many or most exceptions in its brief. CGC Br. at 2. That suggestion is absurd. Every single one of the purportedly abandoned exceptions is supported by relevant law and citations to the administrative record, which is more than sufficient to satisfy Section 102.46(a)(1) and (2) of the Board's Rules and Regulations.[1] And one of Respondents' principal arguments is that the ALJ's misguided effort to swallow the distinction between unit and nonunit work and expand the jurisdiction of the union without so much as a bargain disfigures the CBA and the Act along with it. The CGC should not be allowed to replicate that effort through procedural manipulation in connection with any exceptions before the Board.

The CGC also mocks Respondents for raising what few exceptions they did, charging

[1] The CGC cites Section 102.46(b)(1) and Section 104.46(b)(1) and (2) in support of its argument—the former applying only to answering briefs and the latter a nonexistent regulation found nowhere in the Federal Register. *See* CGC Br. at 1-2.

Respondents with seeking a "do-over."[2] CGC Br. at 1. But having lost almost every significant ruling in this case, Respondents offer no apologies for their comprehensive discussion of the ALJ's errors. It could be that Respondents are mistaken on every point of error; the underlying exceptions are for the Board to decide. But it could also be that the remarkable series of cascading one-sided errors contributed to the ALJ's recommended findings, conclusions of law, and remedial order. Respondents respectfully argue that the latter view is correct: The errors were both pervasive and profound, and resulted in a fundamentally skewed decision and grossly punitive remedy. The excepted findings and conclusions of law thus should be rejected.

ARGUMENT

I. The ALJ's Findings Regarding Community Work Cannot Stand.

The CGC's brief makes absolutely no effort to explain away the incoherence that permeates the ALJ's findings regarding community work. The CGC does not deny that, on the one hand, the CBA prohibits Purple from assigning video interpreting work (or *any* unit work) to nonunit workers, even though much of Purple's community workforce always has consisted of nonunit workers. On the other hand, the CGC does not deny that Purple and the union bargained about most every mandatory subject and that the CBA memorializing the bargain altogether excluded community work. JT-1.[3] The CGC thus does not deny that Purple and the union bargained over the mandatory subjects raised in the Complaint, and that the resulting CBA did not create

[2] With respect to Respondents' exceptions to the ALJ's findings regarding Purple's electronic communications policy, the CGC appears to brief matters not at issue in these exceptions, but otherwise adopts the arguments made by the General Counsel in *Caesars Entertainment Corp. d/b/a Rio All-Suites Hotel and Casino,* Case 28-CA-060841. Notably, the General Counsel's arguments directly conflict with the ALJ's findings in this case.

[3] The CGC asserts that the dues deduction and overtime articles in the CBA apply to "all work," a phrase parroting state and federal overtime statutes found nowhere in the dues deduction article. *Cf.* JT-1. In any event, overtime pay for any work performed by nonexempt employees is mandated by federal and most state law.

obligations regarding community work.[4] To the contrary, the CBA excluded community work from the definition of unit work by requiring that unit work be assigned only to video interpreters who make up only a fraction of the community workforce. Tr. 1183:20-1184:2.

Remarkably, the CGC still insists that Purple was wrong to believe that "there is no continuous duty to bargain during the term of [the CBA] with respect to a matter covered by the contract," including the exclusion of community work. *Bath Marine Draftsmen's Ass'n v. NLRB*, 475 F.3d 14, 23 (1st Cir. 2007) (citation omitted). That mistaken belief is so, the CGC claims, because Purple did not clearly and unmistakably waive the right to bargain over community work. CGC Br. at 9. Although Respondents cited abundant examples from the record of the union's waiver during bargaining, *see* R. Br. at 26-31, a more fundamental problem pervades the CGC's brief: the waiver requirement the CGC wants the Board to apply here evades basic principles of contract interpretation and the purposes of the Act itself. Indeed, the CGC simply ignores the fact that its application of the Board's waiver standard flatly forecloses the possibility of Purple (or any employer) *ever* successfully proving that it lawfully made a unilateral change in a term or condition of employment covered by the CBA.

That fundamental problem is so because the CGC does not ask whether, based on the CBA, the union has "exercise[d] its right to bargain about a particular subject by negotiating for a provision in a collective bargaining contract that fixes the parties' rights and forecloses further

[4] If the Board finds that community work is outside the union's jurisdiction, Purple would not be obligated to bargain over changes in wages for community work or the correction of mistaken dues deduction from wages for community work. *See KIRO, Inc.*, 317 N.L.R.B. 1325, 1328 (1995) ("matters outside the bargaining unit" are not "relevant to…statutory duties"). In that case, Purple also would not be required to respond to requests for information in connection with community work. *See Station GVR Acquisition, LLC d/b/a Green Valley Ranch Resorts Spa Casino,* 366 N.L.R.B. No. 175, at n.6 (2018) (union requests seeking "information about matters outside the bargaining unit . . . are not presumptively relevant").

mandatory bargaining as to that subject." *NLRB v. U.S. Postal Serv.*, 8 F.3d 832, 836 (D.C. Cir. 1993) (citations omitted). Instead, the CGC asks only whether the union here has *relinquished* its right to bargain. Thus, by the CGC's own telling, "[a]t no time did the Union provide *a clear and unmistakable waiver* of its right to bargain over the cessation of community rates" and other subjects regarding community work. CGC Br. at 23 (emphasis in original); *see also* CGC Br. at 17. In other words, the universe of cases in which the CGC will actually *believe* that a union has reached a bargain and memorialized that bargain in a CBA is nearly a null set; in the CGC's view, unless the CBA contains an express waiver of the right to bargain over community work with respect to every mandatory subject, any change to the terms and conditions of community work when performed by video interpreters must be bargained.

Ultimately, even the Board recognizes that where a labor dispute is solely one of contract interpretation, as here, it is "not compelled to endorse either of the[ ] two equally plausible interpretations." *NCR Corp.*, 271 N.L.R.B. 1212, 1213 (1984) (quoting *Vickers*, 153 N.L.R.B. 561, 570 (1965)); *see also Bath Iron Works Corp.*, 345 N.L.R.B. 499, 503 (2005) (Liebman, Member, dissenting). Instead, in these cases, the Board applies the sound arguable basis standard and declines to "enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct." *NCR Corp.*, 271 N.L.R.B. at 1213. Indeed, the CGC itself acknowledges that "under federal labor laws, arbitrators and the courts, rather than the Board, are the primary sources of contract interpretation," *U.S. Postal Serv.*, 8 F.3d at 837, and thus arbitrator decisions are outside the Board's jurisdiction. *See* CGC Br. at 12; *see also Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 201-03 (1991). But, of course, requiring an express clear and unmistakable waiver on the face of a CBA is the polar opposite of declining to "enter the dispute to serve the function of arbitrator." *NCR Corp.*, 271 N.L.R.B. at 1213. So too is reading into the CBA, as here, an

obligation to bargain that contradicts the work exclusivity. When employers can avoid an unfair labor practice only by violating a CBA whose terms are otherwise consistent with the purposes of the Act, it should be proof enough that the rule creating the unfair labor practice does not work.

In fact, courts have recognized for decades that the clear and unmistakable waiver rule that the CGC urges the Board to apply here is both unrealistic and unworkable. *See, e.g.*, *Bath Marine Draftsmen's Ass'n*, 475 F.3d at 25; *Dep't of Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992); *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 936-37 (7th Cir. 1992). It is unrealistic because in cases such as here, "a waiver analysis without considering that [community work] might be 'covered by'"—indeed excluded from—the CBA, fails "to define the boundaries" of the union's jurisdiction. *Postal Serv.*, 8 F.3d at 837; *see also IRS v. FLRA*, 963 F.2d 429, 440 (D.C. Cir. 1992). And it is unworkable because no rational or responsible employer would even consider applying contract terms that exclude nonunit work from a CBA—such as the work exclusivity clause here—so long as the Board continues to find unfair labor practice charges unless a union specifically "relinquishes its right to bargain about [every] matter [covered by a CBA]." *Dep't of Navy*, 962 F.2d at 57. It is therefore little surprise that the ALJ's decision here makes it nearly impossible for Purple to comply with the Act, abide by the CBA, and run its community business all at once.

But all this incoherency is really a symptom of a much more immediate problem with both the ALJ's decision and the CGC's brief: there is no evidence in the record that Purple contracted away its right to freely determine the terms and conditions of community work performed by unit workers. Indeed, this case should have been straightforward whatever legal standard the ALJ applied. The CGC's contrary assertions rest on manifestly incorrect arguments duplicated from the ALJ's decision in a silk-screening process that changed the color composition of the administrative record. When viewed in its original form, the record demonstrates that no further

bargaining was necessary under the CBA's coverage; that Purple had a sound arguable basis to conclude that community work was not unit work; and that the union clearly and unmistakably waived bargaining over community work. Under each of these three legal standards, the ALJ's decision cannot stand.

First, the CBA covers each and every mandatory subject of bargaining at issue in this case, but excludes community work from each. A reasonable employer would thus conclude that it need not bargain any further over most or all terms and conditions of community work. The CGC points to no record evidence that contradicts the testimony that every provision of the CBA, including all mandatory subjects, were designed to operate a video interpreting business, not a community business. Tr. 1198:12-22. Although community interpreters receive emergency pay, travel pay, mileage reimbursements, and different pay rates for different kinds of community work (e.g., legal work, work requiring a security clearance), the CBA excludes those things from its articles that cover wages and compensation. Tr. 1198:23-1199:20. Likewise, even though Purple has a discrete procedure for scheduling community work, the CBA speaks to scheduling video interpreting work alone and to the exclusion of community work. Tr. 1198:12-22; 1200:18-23; 1201:7-1202:11. In fact, the word "community" is not mentioned at all, much less in connection with the terms of any mandatory subject of bargaining covered by the CBA. In short, the CBA's coverage excludes community work.

Second, Purple had a sound arguable basis for interpreting the CBA as excluding community work. A contrary conclusion would render the CBA's work exclusivity clause a nullity. Article 1 of the CBA prohibits the company from assigning unit work to nonunit workers unless volume exceeds expectations. JT-1. According to the unchallenged testimony of the company's vice president for operations, the company does *not* assign community work to

community interpreters and independent contractors—who are definitionally excluded from the bargaining units—"*only* when volume exceeds expectations." Tr. 1197:6-8 (emphasis added). To the contrary, community interpreters and independent contractors—not video interpreters—perform most of Purple's community work, regardless of volume. Tr. 1197:16-23.

The only plausible way to reconcile that practice with the union's own interpretation of the CBA is to conclude that community work never was intended to be unit work. The union, after all, told its members that the CBA "makes it clear that, except under extraordinary circumstances, only unit employees may be assigned [unit] work . . . [,] increasing employee security because the company may not subcontract or outsource the work." Ex. R-19 at 1. Notwithstanding nearly a decade of practice consistent with this understanding, *see* Tr. 1177:6-7, 1195:22-25, the union only later asserted that community work had to be read into the contractual definition of bargaining unit work. ALJ Decision at 14; JT-37 at 1. Yet, under bedrock principles of contract interpretation, to isolate the CBA's exclusivity clause from practice and to discount the wider terms and conditions of the CBA that apply only to video interpreting work is to do too much violence to the CBA for the interpretation to be plausible.

Third, the CGC did not and could not explain away the union's abandonment of every bargaining proposal even remotely related to community work, and, particularly the subjects that form the basis for the CGC's allegations. The CGC does not deny that, on the one hand, a union waives its right to bargain "by the conduct of the parties (including past practices, bargaining history, and action or inaction)." *Am. Diamond Tool, Inc.*, 306 N.L.R.B. 570, 570 (1992) (citation omitted); *see* CGC Br. at 23. On the other hand, the CGC does not deny that "evidence of defeated proposals during negotiations is . . . reliable evidence [of waiver]." *W-I Canteen Serv., Inc. v. NLRB*, 606 F.2d 738 (7th Cir. 1979) (citing *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71, 80-

81 (1953)). Instead, the CGC parses words in the record, speculating that the union did not realize that it was waiving the right to bargain precisely the same subjects that it repeatedly abandoned. *See* Tr. 2611:24-2612:6. But the record tells a different story: each time the parties bargained a mandatory subject, the union either abandoned proposals or did not make proposals regarding the terms and conditions of community work. *See* Tr. 1366:7-24; 1367:8-9; 1369:11-1371:6; R-11; R-12. In fact, the union's bargaining representative even testified that the union intentionally walked away from its proposals regarding community work because the union "wanted a contract" and "[i]t wasn't worth fighting for." Tr. 2612:1-6. Because there is not a shred of evidence from which the ALJ could conclude that the union did anything short of clearly and unmistakably waiving any right it had to bargain the terms and conditions of community work, the ALJ's conclusion that Purple violated the Act cannot stand.

At bottom, the CGC asks the Board to contort its clear and unmistakable waiver standard and push aside the contract coverage and sound arguable basis standards to conclude that community interpreting work must be bargained at every turn. That result would not only force Purple to disregard the plain language of the CBA and bargaining history that together limit unit work to video interpreting, but also to create confusion about the future assignment of community work to unit and nonunit workers. The resulting lack of flexibility creates a Hobson's choice that the CGC never does reconcile: on the one hand, risk violating the Act; on the other hand, risk breaching the CBA's exclusivity clause by assigning too much community work to community interpreters (who are not members of the bargaining unit). Because neither result is workable, the Board should reject the ALJ's findings as to community work in their entirety.

II. The ALJ's *Weingarten* Findings Cannot Be Reconciled with the Act.

The CGC fares no better with its attempt to defend the ALJ's *Weingarten* findings. Specifically, the CGC neglects the question that the Supreme Court deemed the most critical to

investigatory interviews, as here: whether the employer "did not prohibit [the union representative or steward] from speaking at [the employee's] interview." *Smith's Food & Drug Ctrs., Inc.*, 361 N.L.R.B. 1216, 1219 (2014) (Miscimarra, Member, dissenting); *see NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 259-60 (1975). Without such a prohibition, there is no *Weingarten* violation. Here, because there was no prohibition on speaking at the interview, the CGC's argument that the union steward was prohibited from speaking is inconsistent with Supreme Court precedent.

Nor does the CGC give anything more than short shrift to *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) in attacking the call center manager's email. *See* CGC Br. at 33-34. There never was a dispute here that the VRS floor was (and still is) at the very core of Purple's video interpreting operations or that chatter within sight or earshot of workstations would interfere with video calls. Tr. 1179:16-1180:5. Tellingly, the ALJ's decision neglects to mention that alternative meeting spaces were then (and remain) available to video interpreters. In fact, the manager's email itself invited the steward to "use the quiet room, conference room, or other quiet space off the VRS floor." JT-53 at 1. Because the ALJ's decision failed to strike the *Republic Aviation* balance, and neglected to even consider whether the manager's email "entirely deprived" the steward of a place to engage in Section 7 activity (it did not), the ALJ's decision should not be sustained. *Republic Aviation Corp.*, 324 U.S. at 801 n.6.

The CGC's arguments regarding the call center manager's civility rules, ALJ Decision at 64, suffer from the same basic defects. CGC Br. at 28-33. The Board has included civility rules among the types of work rules that are generally lawful. *See Boeing Co.*, 365 N.L.R.B. No. 154, slip op. at 4 n.15 (2017). Given the company's interest in preventing a toxic work environment and the slight effect, if any, on NLRA rights, the Board should uphold the manager's call for civility and reject the ALJ's finding to the contrary.

III. The ALJ's Remedial Order Violates the Act.

Finally, the CGC seeks to prop up the remedial order in this case, GCG Br. at 38-41, which is contrary to both Supreme Court precedent and, remarkably, the directive of its own client, the General Counsel. *See Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11-12 (1940); *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 235-36 (1938); *see also* Memorandum GC 18-02 (Dec. 1, 2017), at 1, 4 (requiring Regional Directors to submit such cases to Mandatory Advice). The order is contrary because it is punitive; it commands the employer in this case to pay union dues that the employees alone were responsible for paying. Yet, on the Board's remedial power, the Supreme Court could not be more clear: remedies of any kind "should be construed in harmony with the spirit and remedial purposes of the Act," because the Board's "power to command affirmative action is remedial, not punitive." *Republic Steel Corp. v. NLRB*, 311 U.S. at 11-12; *see also Consol. Edison Co.*, 305 U.S. at 235-36. In other words, the Board may only order a make-whole remedy when an employer or union violate the Act. The ALJ's recommended remedy to the contrary rests on the Board's made-up power, rejected by courts, to design remedies with "the effect of deterring persons from violating the Act." 311 U.S. at 12. Nowhere in the CGC's brief does it even attempt to reconcile Supreme Court precedent with the remedial order in this case.

CONCLUSION

For the foregoing reasons, Purple respectfully requests that the Board decline to adopt the ALJ's findings and conclusions with regard to the allegations in Paragraphs 5(a), 5(u), 5(x), 7(n), 7(cc), 8(a), and 8(d) of the Complaint, and dismiss those Paragraphs of the Complaint.

Dated: January 18, 2018

Respectfully submitted,
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By: /s/ *Lawrence D. Levien*
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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2018, I caused a copy of the foregoing Reply Brief to the General Counsel's Answering Brief to the Exceptions of Respondents Purple Communications, Inc. and CSDVRS, LLC d/b/a ZVRS to the Decision of the Administrative Law Judge to be served, via the NLRB e-filing system and electronic mail, on the following:

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